

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
SIDNEY ROBERT MILLER,) CASE NO. 12-20505 JPK
) Chapter 13
Debtor.)

ORDER OF DISMISSAL OF CASE, WITH BAR TO REFILING

On March 26, 2012, a hearing was held with respect to the Motion to Dismiss filed by the Chapter 13 Trustee Paul R. Chael on March 14, 2012. Trustee Chael ("Trustee") appeared personally; the debtor Sidney Robert Miller ("Miller"), proceeding *pro se*, appeared personally; creditor Atlantic Municipal Corporation appeared by counsel Seth Buitendorp.

This case was initiated by a petition filed by Miller on February 27, 2012. The principal ground for the Trustee's motion to dismiss the case is that on the date the petition was filed, a Chapter 13 case in which Miller was the debtor was pending in the United States Bankruptcy Court for the Northern District of Illinois, in which debts subject to discharge in this case were also subject to discharge.

The docket records of the United States Bankruptcy Court for the Northern District of Illinois, the United States District Court for the Northern District of Illinois, and the United States Court of Appeals for the Seventh Circuit state the following as to three Chapter 13 cases in which Miller is the sole debtor:

1. Case Number 10-11741 was filed on March 18, 2010, and was dismissed on motion of the Chapter 13 Trustee in that case on May 11, 2010. The basis for the motion, and the ground upon which dismissal was granted, was Miller's failure to comply with 11 U.S.C. § 521(a)(1) with respect to documents required to be filed at the inception of the case. Miller filed a notice of appeal to the United States District Court with respect to the order of dismissal on June 29, 2010. The United States District Court affirmed the dismissal, and Miller then filed

a notice of appeal of the decision of the United States District Court on April 14, 2011, appealing that decision to the United States Court of Appeals for the Seventh Circuit. This appeal remains pending before the Seventh Circuit.

2. Case Number 10-25290 was filed by Miller on June 3, 2010. The case was initially dismissed by order of the United States Bankruptcy Court entered on July 26, 2010. Miller appealed this dismissal to the United States District Court for the Northern District of Illinois, which reversed the order of dismissal and remanded the case back to the United States Bankruptcy Court. Subsequently, the United States Bankruptcy Court again dismissed the case by final order entered on January 30, 2012. This dismissal was on the Chapter 13 Trustee's motion to dismiss, which stated as the asserted grounds for dismissal inconsistencies in the debtor's stated income, infeasibility of any plan which might be proposed by the debtor, and material default by the debtor with respect to payment of amounts to the Trustee necessary to fund his plan, in the manner called for by the plan. Miller appealed this order of dismissal to the United States District Court for the Northern District of Illinois on February 27, 2012. At the time of filing of the case presently before this court, this appeal had not yet been docketed in the United States District Court.

3. Case Number 10-34623 was filed by Miller on August 2, 2010. On September 13, 2010, Miller filed a motion for withdrawal of reference of the case from the United States Bankruptcy Court to the United States District Court. This motion was denied by the United States District Court, and on November 4, 2010, Miller appealed the decision of denial of withdrawal of reference to the United States Court of Appeals for the Seventh Circuit. On the date of the filing of the case presently before the court, this appeal was pending in the United States Court of Appeals for the Seventh Circuit, and had been consolidated for the purposes of appeal with the appeal of the order of dismissal in Case Number 10-11741 also pending before the Seventh Circuit. On the date the case presently before the court was filed, this Chapter 13

case had not been dismissed and remained a viable, pending case before the federal courts of the Northern District of Illinois. Miller filed a notice/motion to dismiss this case on the record of the United States Bankruptcy Court for the Northern District of Illinois on March 20, 2012.

Thus, on the date of filing of the instant case, the order of dismissal of Case Number 10-11741 was subject to an appeal in the United States Court of Appeals for the Seventh Circuit, and as a result subject to reversal of the order of dismissal. Case Number 10-25290 was the subject of an appeal to the United States District Court for the Northern District of Illinois, seeking to reverse the order of dismissal of that case. Case Number 10-34623 remained a viable Chapter 13 case, stuck in limbo, however, due to the appeal to the United States Court of Appeals for the Seventh Circuit of the United States District Court's order denying withdrawal of the reference.

In *In re Brandford*, 386 B.R. 742 (Bankr. N.D.Ind. 2008), this court determined that a debtor could not maintain "simultaneously pending" bankruptcy cases in a circumstance in which matters concerning dischargeability of debts of the debtor were pending in both cases, and that dismissal of the more recently filed case "for cause" pursuant to 11 U.S.C. § 1307(c) was the appropriate, and necessary, remedy for dealing with the more recently filed case. In the circumstances of the case now before the court, Miller has three pending cases in which the debts potentially subject to discharge in this case are also potentially subject to discharge in prior cases. The potential in two of those cases lies in the fact that the United States Court of Appeals in one of them, and the United States District Court for the Northern District of Illinois in another, may reverse the order of dismissal entered by a lower court, thus reinstating those respective cases and Miller's potential for obtaining discharge of debts in those cases. The third case – Case Number 10-34623 – remained an active case on the date that Miller's Northern District of Indiana Chapter 13 case was filed, and it also involved debts involved in the Northern District of Indiana case. Miller sought to dismiss this case subsequent to the filing of

his Indiana case. However, the pendency of the Seventh Circuit Court of Appeals appeal in relation to the order of the United States District Court denying withdrawal of the reference of the United States Bankruptcy Court, should preclude both the United States Bankruptcy Court and the United States District Court from acting further in the case, until the Court of Appeals determines which court can exercise jurisdiction. As stated in *In re Statistical Tabulating Corp., Inc.*, 60 F.3d 1286, 1289 (7th Cir. 1995):

[T]he general rule [is] that the filing of a notice of appeal divests a lower court of jurisdiction over the matter on appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982); *In re Alwan Bros. Co.*, 115 B.R. 148, 150 (Bankr.C.D.Ill.1990) (“[u]pon the filing of a notice of appeal from an order of the bankruptcy court, the bankruptcy court loses jurisdiction over matters involved in the appeal”).

The filing of a notice of appeal is an event of jurisdictional significance-it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.... The ‘jurisdictional significance’ of a pending appeal applies equally to a bankruptcy court. The filing of a notice of appeal to a district court divests a bankruptcy court of jurisdiction to proceed with matters raised by such appeal. This divestment of jurisdiction preserves the integrity of the appellate process by avoiding needless confusion which would flow from putting the same issues before two courts at once.

As a result of the foregoing circumstances, the court determines that Miller’s Case Number 12-20505 must be dismissed “for cause” pursuant to 11 U.S.C. § 1307(c).

There are additional grounds for dismissal established by the record made at the hearing held on March 26, 2012.

First, Miller is not eligible to be a debtor in a case under Chapter 13 by operation of 11 U.S.C. § 109(h)(1), because he had not received the credit counseling briefing required by that provision within the 180-day period prior to the filing of Case Number 12-20505. Miller stated at the March 26, 2012 hearing that a credit counseling service had advised him that the course which he was required to take was the course provided for by 11 U.S.C. § 1328(g)(1), as that

course is provided for by 11 U.S.C. § 111. Whatever advice Miller may have received is not pertinent to whether or not he is eligible to be a debtor in this case. The simple fact is that he failed to comply with 11 U.S.C. § 109(h)(1), and that he cannot be a debtor eligible for any relief in Case Number 12-20505.

Additionally, the court questions the good faith of the debtor in filing the instant case, in view of his course of conduct in three prior bankruptcy cases in the United States Bankruptcy Court for the Northern District of Illinois, each of which is still active in some form or another because no ultimately final determination of dismissal of any of them has yet been made. A primary problem in the administration of the federal bankruptcy laws has been the occurrence of serial filings, a circumstance in which a debtor ends, or has terminated, one case; immediately or shortly thereafter initiates another case to deal with the same debts and circumstances as the prior case – with this second case then being terminated without discharge or resolution of those debts; and the debtor then files yet another case or cases serially to deal with those same debts.

The primary purpose of the provisions of 11 U.S.C. § 362(c)(3) and 11 U.S.C. § 362(c)(4) is to avoid the manipulation of the automatic stay, and the thwarting of creditor's enforcement of rights and remedies, by the filing of sequential cases to deal with identical or nearly identical circumstances as involved in prior cases. While a hearing was also set on March 26, 2012 on Miller's motion for imposition of the automatic stay pursuant to 11 U.S.C. § 362(c)(4), any determination of that motion was rendered moot by the court's determination to dismiss this case. However, had that motion been actively before the court, the court would have denied it on the basis that this case – given the circumstances of the three prior cases that have gone before it in the Northern District of Illinois – was filed in bad faith. Had this determination been made, it may have had a *res judicata* effect with respect to determination of confirmation of any plan proposed by Miller in this case, by application of the requirement of 11

U.S.C. § 1325(a)(7) that in order to confirm a plan, the court must find that “the action of the debtor in filing the petition was in good faith”. The principal standard by which the good faith of a case filing is measured is whether the filing of the case is fundamentally fair in dealing with creditors; see, *In re Rimgale*, 669 F.2d 426 (7th Cir. 1982). Based upon Miller’s record of serial filings and his obviously conscientious attempt to maintain those filings seemingly *ad infinitum* by the mechanism of appealing adverse decisions, one could certainly question the good faith of the filing of this case now before the court, and determine that this filing violates the principal of good faith dealing with creditors.

Although the Trustee’s motion was premised solely on the pendency of simultaneous cases involving discharge of the same debts, the additional considerations stated above also provide grounds for dismissal. The motion to dismiss initiated a contested matter under Fed.R.Bankr.P. 9014. That rule incorporates into contested matters the provisions of Fed.R.Bankr.P. 7054, which in turn incorporates the provisions of Fed.R.Civ.P. 54(c), which states that apart from a default judgment, “(e)very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings”. As a result, there are multiple reasons to dismiss Miller’s petition in Case Number 12-20505.

Finally, until the three bankruptcy cases now pending in the Northern District of Illinois have been finally determined by exhaustion of appeals and final determinations in those appeals, the potential for another bankruptcy case filing by Miller in circumstances identical to those presented in this case exists. At least with respect to the federal courts of the Northern District of Indiana, the court deems it necessary to enjoin Miller, pursuant to 11 U.S.C. § 105(a) and 11 U.S.C. § 349(a), from filing a petition initiating any case under Title 11 of the United States Code in the federal courts of the Northern District of Indiana until all three of his cases now at various stages of appeal in the Northern District of Illinois have been finally and completely concluded by final judgment entered in an applicable appeal or in the court

ultimately otherwise entering final judgment in those cases.

IT IS ORDERED as follows:

A. Miller's petition in Case Number 12-20505, and that case itself, is dismissed.

B. Sidney Robert Miller is enjoined from voluntarily initiating any case under Title 11 of the United States Bankruptcy Code in a federal court of the Northern District of Indiana until totally final judgments of dismissal have been entered in Case Numbers 10-11741, 10-25290 and 10-34623 in the United States Bankruptcy Court for the Northern District of Illinois, or the debtor obtains a discharge under 11 U.S.C. § 1328 or 11 U.S.C. § 727 in one of those cases.

Dated at Hammond, Indiana on April 6, 2012.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution
Debtor
U.S. Trustee, Trustee
All Creditors
All Intervenors